

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

**ORDER ADDING RULE 134 TO THE
SUPERIOR COURT RULES OF CIVIL PROCEDURE**

This 9th day of August, 2011, ***IT IS ORDERED*** that:

(1) The Superior Court Rules of Civil Procedure are amended by the addition of the following rules:

**XVI. RULES GOVERNING MEDIATION AND
ARBITRATION PROCEEDINGS FOR
BUSINESS DISPUTES**

Rule 134. Scope of Rules for Mediation.

(a) These rules shall govern the procedure in mediation proceedings for business disputes pursuant to 10 *Del. C.* § 546.

(b) In the case of disputes involving solely a claim for monetary damages, a matter will be eligible for mediation only if the amount in controversy exceeds one-hundred thousand dollars.

(c) The parties with the consent of the Mediator may change any of these mediation rules by agreement.

(d) *Definitions.*

(1) “Mediation” means the process by which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution and includes all contacts between the Mediator and any party or parties, until such time as a resolution is agreed to by the parties or the parties discharge the Mediator.

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 2

(2) “Mediator” means a judge or commissioner sitting permanently in the Court.

(3) “Mediation conference” means the process, which may consist of one or more meetings or conferences, pursuant to which the Mediator assists the parties in seeking a mutually acceptable resolution of their dispute through discussion and negotiation.

(4) “Consent to Mediate” means a written or oral agreement to engage in mediation in the Superior Court. Provided that the parties and the amount in controversy meet the eligibility requirements in 10 *Del. C.* § 546, a consent to mediate is acceptable if it contains the following language: “The parties agree that any dispute arising under this agreement shall be mediated in the Superior Court of the State of Delaware, pursuant to 10 *Del. C.* § 546.”

Rule 135. Commencement of Mediation.

(a) *Petition.*

(1) Mediation is commenced by submitting to the Prothonotary a petition for mediation (hereinafter a “petition”) and the filing fee specified by the Prothonotary. The petition must be signed by Delaware counsel, as defined in Rule 90.1 (a). Sufficient copies shall be submitted so that one copy is available for delivery to each party as hereafter provided, unless the court directs otherwise.

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 3

(2) The petition shall be sent by the Prothonotary, via next day delivery, to either a person specified in the applicable agreement between the parties to receive notice of the petition or, absent such specification, to each party's principal place of business or residence. The petitioning party shall provide the Prothonotary with addresses of each party.

(3) The petition will identify the issues to be mediated and specify the method by which the parties shall attempt to resolve the issues. The petition must also contain a statement that all parties have consented to mediation by agreement or stipulation, that the Superior Court would have subject matter jurisdiction to adjudicate the business dispute, that at least one party is a business entity, that at least one party is a business entity formed or organized under the laws of Delaware or having its principle place of business in Delaware, or that the business dispute is governed by Delaware law, and that no party is a consumer with respect to the dispute. In the case of disputes involving solely a claim for monetary damages, the petition must contain a statement of the amount in controversy.

(4) *Confidentially.* The petition and any supporting documents are considered confidential and not of public record. The Prothonotary will not include the petition as part of the public docketing system.

(b) *Appointment of the Mediator.* Upon receipt of a petition, the Court will appoint a Mediator.

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 4

(c) *Date, Time, and Place of Mediation.* The Mediator will set the date, time, and place of the mediation conference within 15 days following receipt of the petition. The mediation conference generally will occur no later than 60 days following receipt of the petition.

(d) *Submission of Documents.* There shall be no formal discovery in connection with mediation proceeding under these Rules. The Mediator may request parties to exchange or provide to the Mediator documents or other materials necessary to understand the dispute or facilitate a settlement. The parties may agree to exchange any documents or other material in the possession of the other that may facilitate a settlement.

Rule 136. Mediation Conference.

(a) *Participation.* At least one representative of each party with an interest in the issue or issues to be mediated and with authority to resolve the matter must participate in the mediation conference. Delaware counsel, as defined in Rule 90.1(a), shall also attend the mediation conference on behalf of each party.

(b) *Confidentially.* Mediation conferences are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. A Mediator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as a mediator. All memoranda and work product contained in the case files of a mediator are confidential. Any communication made in or in connection with the mediation that relates to the controversy being mediated, whether made to the mediator or a party, or to any person if made at a mediation conference, is confidential. Such

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 5

confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions:

(1) Where all parties to the mediation agree in writing to waive the confidentiality, or

(2) Where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the mediation conference. A mediation agreement, however, shall not be confidential unless the parties otherwise agree in writing.

(c) *Civil Immunity.* Mediators shall be immune from civil liability for or resulting from any act or omission done or made in connection with efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.

(d) *Mediation Agreement.* If the parties involved in the mediation proceedings reach agreement with regard to the issues identified in the petition, their agreement shall be reduced to writing and signed by the parties and the Mediator. The agreement shall set forth the terms of the resolution of the issues and the future responsibility of each party.

(e) *Termination of Mediation Conference.*

(1) The Mediator shall officially terminate the

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 6

mediation conference if the parties are unable to agree. The termination shall be without prejudice to either party in any other proceeding. The Mediator shall have no authority to make or impose any adjudication, sanction, or penalty upon the parties. No party shall be bound by anything said or done at the mediation proceeding unless an agreement is reached.

(2) The Mediator is ineligible to adjudicate any subsequent litigation arising from the issues identified in the petition.

(f) *Compensation for Mediation.* The Court will be compensated by the parties to the mediation in accordance with the schedule of fees maintained by the Prothonotary.

Rule 137. Arbitration.

(a) These rules shall govern the procedure in arbitration proceedings for business disputes pursuant to *Del. C. § 546*.

(b) In the case of business disputes involving solely a claim for monetary damages, a matter will be eligible for arbitration only if the amount in controversy exceeds one-hundred thousand dollars.

(c) The parties with the consent of the Arbitrator may change any of these arbitration rules by agreement and/or adopt additional rules. Except to the extent inconsistent with these rules, or as modified by the Arbitrator or the parties, Superior Court Rules 26 through 37 shall apply to the Arbitration proceeding.

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 7

(d) *Definitions.*

(1) “Arbitration” means the voluntary submission of a dispute to an Arbitrator for final and binding determination and includes all contracts between the Arbitrator and any party or parties, until such time as a final decision is rendered or the parties discharge the Arbitrator.⁷

(2) “Arbitrator” means a judge or commissioner sitting permanently in the Court. Absent agreement of the parties, the Arbitrator shall not have served as the Mediator in a mediation of the dispute under the Superior Court Rules.

(3) “Preliminary conference” means a telephonic conference with the parties and/or their attorneys or other representatives

(i) to obtain additional information about the nature of the dispute and the anticipated length of hearing and scheduling,

(ii) to obtain conflicts statements from the parties, and

(iii) to consider with the parties whether mediation or other non-adjudicative methods of dispute resolution might be

⁷ Arbitrate has previously been defined as “a process by which a neutral arbitrator hears both sides of a controversy and renders a fair decision based on the law. If the parties stipulate in writing, the decision shall be binding. Arbitration may be mandatory or by agreement.” Super. Ct. Civ. R. 16. Because this definition fails to encapsulate the “voluntariness” required by House Bill 433, the Court of Chancery rule is closer to the legislative intent.

**ORDER ADDING RULES 134 - 139 TO THE
SUPERIOR COURT RULES OF CIVIL PROCEDURE**

Page 8

appropriate.

(4) “Preliminary Hearing” means a telephonic conference with the parties and/or their attorneys or other representatives to consider, without limitation:

(i) service of statements of claims, damages and defenses, a statement of the legal issues asserted by each party and positions with respect thereto, and any legal authorities upon which the parties rely,

(ii) stipulations of fact,

(iii) the scope of discovery,

(iv) exchanging and pre-marking of exhibits for the hearing,

(v) the identification and availability of witnesses, including experts, and such matters with respect to witnesses, including their qualifications and expected testimony as may be appropriate,

(vi) whether, and to what extent, any sworn statements and/or depositions may be introduced,

(vii) the length of hearing,

(vii) whether a stenographic or other official record of the proceedings shall be

**ORDER ADDING RULES 134 - 139 TO THE
SUPERIOR COURT RULES OF CIVIL PROCEDURE**

Page 9

maintained,

(ix) the possibility of mediation or other non-adjudicative methods or dispute resolution, and

(x) the procedure for the issuance of subpoenas.

(5) “Scheduling order” means the order of the Arbitrator setting forth the pre-hearing activities and the hearing procedures that will govern the arbitration.

(6) “Arbitration hearing” means the proceeding, which may take place over a number of days, pursuant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case

(7) “Consent to Arbitrate,” means a written or oral agreement to engage in arbitration in the Superior Court and shall constitute consent to these rules. Provided that the parties and the amount in controversy meet the eligibility requirements in 10 *Del. C. § 546*, which apply to the arbitration of business disputes, a consent to arbitrate is acceptable if it contains the following language: “The parties agree that any dispute arising under this

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 10

agreement shall be arbitrated in the Superior Court of the State of Delaware, pursuant to 10 *Del. C.* § 546.”

Rule 138. Commencement of Arbitration.

(a) *Petition.*

(1) Arbitration is commenced by submitting to the Prothonotary a petition for arbitration (hereinafter a “petition”) and the filing fee specified by the Prothonotary. The petition must be signed by Delaware counsel, as defined in 90.1(a). Sufficient copies shall be submitted so that one copy is available for delivery to each party as hereafter provided, unless the Court directs otherwise.

(2) The petition shall be sent by the Prothonotary, via next business-day delivery, to either a person specified in the applicable agreement between the parties to receive notice of the petition or, absent such specification, to each party’s principle place of business or residence. The petitioning party shall provide the Prothonotary with addresses of each party.

(3) The petition shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the claims and the remedy sought. The petition must also contain a statement that all parties have consented to arbitration by agreement or stipulation, that the Superior Court would have subject matter jurisdiction to adjudicate the business dispute, that

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 11

at least one party is a business entity, that at least one party is a business entity formed or organized under the laws of Delaware or having its principle place of business in Delaware, or the business dispute is governed by Delaware law, and that no party is a consumer with respect to the dispute. In the case of business disputes involving solely a claim for monetary damages, the petition must contain a statement of the amount in controversy.

(4) *Confidentiality*. The Prothonotary will not include the petition as part of the public docketing system. The petition and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its Rules, and to the extent applicable, the Rules of this Court.

(b) *Appointment of the Arbitrator*. Upon receipt of a petition, the Court will appoint an Arbitrator.

(c) *Preliminary Conference*. The Arbitrator will contact the parties' counsel to set the date and time of the preliminary conference, which shall occur within 10 days after the commencement of the arbitration, unless the parties and the Arbitrator agree, pursuant to Rule 137(c)⁸, to extend that time.

(d) *Preliminary Hearing*. The preliminary hearing shall take place as soon as practicable after the preliminary

⁸ Rule 137(c) as referenced in the proposed rules, not the current Superior Court Rule 4(c).

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 12

conference. The Arbitrator shall issue a scheduling order promptly after the preliminary hearing.

(e) *Date, Time, and Place of Arbitration.* The Arbitrator will set the date, time, and place of the arbitration hearing at the preliminary hearing. The arbitration hearing generally will occur no later than 90 days following receipt of the petition.

(f) *Exchange of Information.* There shall be pre-hearing exchange of information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the approval of the Arbitrator, to forego pre-hearing exchange of information. The parties shall, in the first instance, attempt to agree on pre-hearing exchange of information, which may include depositions, and shall present any agreement to the Arbitrator for approval at the preliminary hearing or as soon thereafter as possible. The Arbitrator may require additional exchange of information between and among the parties, or additional submission of information to the Arbitrator. If the parties are unable to agree, they shall present the dispute to the Arbitrator who shall direct such pre-hearing exchange of information as he/she deems necessary and appropriate.

Rule 139. Arbitration Hearing.

(a) *Participation.* At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the arbitration hearing. Delaware counsel, as defined in Rule 90.1(a), shall also attend the arbitration hearing on behalf of each party.

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 13

(b) *Confidentiality*. Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential.

(1) Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions:

(a) where all parties to the arbitration agree in writing to waive the confidentiality, or

(b) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the arbitration hearing.

(c) *Civil Immunity*. Arbitrators shall be immune from civil liability for or resulting from any act or omission done or made in connection with the Arbitration, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.

ORDER ADDING RULES 134 - 139 TO THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

Page 14

(d) *Mediation Option.* The parties may agree at any stage of the arbitration process to submit the dispute to the Court for mediation. The judge or commissioner assigned to mediate the dispute may not be the Arbitrator unless the parties agree.

(e) *Settlement Option.* The parties may agree, at any stage of the arbitration process, to seek the assistance of the Arbitrator in reaching settlement with regard to the issues identified in the petition prior to a final decision from the Arbitrator. Any settlement agreement shall be reduced to writing and signed by the parties and the Arbitrator. The agreement shall set forth the terms of the resolution of the issues and the future responsibility of each party.

(f) *Remedy and Relief.*

(1) *Award.* The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties.

(2) In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards.

(3) Upon the granting of a final award, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree.

(4) The Arbitrator is ineligible to adjudicate any subsequent litigation arising from the issues identified in the petition.

**ORDER ADDING RULES 134 - 139 TO THE
SUPERIOR COURT RULES OF CIVIL PROCEDURE**

Page 15

(g) *Costs for Arbitration.* Costs for filing and per-day (or partial day) fees shall be assessed in accordance with a schedule to be maintained by the Prothonotary.

(2) This amendment shall be effective August 9, 2011.

(3) An original of this Order shall be filed with the Prothonotary for each county.